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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 529

UNITED STATES, Appellant

v.

CARLO BIANCHI AND COMPANY, INC., Respondent

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Should the Wunderlich Act be interpreted to require the Court of Claims to restrict its inquiry into the finality of decisions arising under the standard form of Government contract disputes clause to the "administrative record" upon which such decisions might have been based, where the announced purpose of Congress in passing that Act was to overcome the

decision of this Court in *United States v. Wunderlich*, where the Act re-established the rule that such administrative decisions possessed no finality if fraudulent or arbitrary or capricious, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, all of which standards the Court of Claims had uniformly applied on the basis of evidence presented *de novo*.¹

STATUTORY PROVISIONS INVOLVED

The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act, 41 U.S.C. 321-322) provides:

§ 321. Limitation on pleading contract-provisions relating to finality; standards of review.

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

¹ It should be noted that the "Question Presented" in the appellant's brief (p. 2) is whether claimant is entitled to present evidence *de novo* on an issue of fact submitted to administrative determination whereas, in the petition for certiorari the "Question Presented" is whether the Court of Claims may upset an administrative decision "without regard to the substantiating evidence before the administrative authority and solely on the basis of evidence present at a *de novo* trial to that court." (Pet. p. 2)

§ 322. Contract provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

STATEMENT REGARDING FACTS

The appellant states "The government petitioned for certiorari solely on the important legal question whether the Court of Claims was required to consider the factual determinations of the Board on the basis of the administrative record." The appellant also makes the statement that no issue involving the weighing of evidence is before this Court. App's Br. Footnote p. 20. Nor is any such issue now raised by respondent. Limited reference will hereafter be made to certain facts relating to respondent's contention that no finality can attach to the decision of the Appeals Board by reason of administrative irregularities. With the issues before this Court so narrowed, it is unnecessary for respondent to point out the errors and omissions in appellant's statement of "The Undisputed Facts," nor to discuss the question whether the Board's decision was supported by substantial evidence on the basis of the administrative record or of the record before the Court of Claims. Respondent merely wishes to comment that a study of either or both records amply justifies the decision of the Court of Claims.

SUMMARY OF ARGUMENT

The Wunderlich Act, 41 U.S.C. 321, provides that administrative determinations of factual disputes arising out of government contracts are "final and conclusive" unless the determination is "fraudulent or

capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." Respondent submits that judicial review of these administrative determinations of fact by the Court of Claims is not restricted to the administrative record.

Nothing in the legislative history of the Wunderlich Act indicates a desire on the part of Congress either to change the jurisdiction of the Court of Claims over contract cases or to change in any way the long standing procedures that had been adopted by the Court of Claims for the review of administrative decisions on the basis of evidence presented *de novo*. Congress was made fully aware of these procedures employed by the Court of Claims and the standards applied.

Congress expressed the purpose of the Wunderlich Act as being "to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich* (342 U.S. 98)." Congress was attempting to restore the situation to what it had been prior to the Wunderlich decision, to restore to contractors all the rights they had before this decision. In so doing Congress adopted the views of many witnesses who appeared before the Congressional Committees who testified to that effect.

Congress was informed of the irregularity, and in many instances the inadequacy of the administrative proceedings which took place in advance of the administrative decision and of the necessity for an effective impartial review by the court in the traditional manner in which the Court of Claims had always granted such a review.

There is nothing in the language of the Act to suggest the procedure to be used by the reviewing court in applying the statutory standards. The language indicates no intention on the part of Congress to alter the usual procedures of the Court of Claims permitting presentation of evidence *de novo*. Such procedures, applying similar standards, are frequently employed in reviewing administrative determinations of federal and state officials.

Where Congress intended review to be restricted to the administrative record, whether or not standards for review had been set forth, the statutes involved require the making of an administrative record and provide for other procedural safeguards. E.g., Administrative Procedure Act; Fair Labor Standards Act; National Labor Relations Act. Since Government Contract Boards, unlike most administrative agencies are directly involved as interested parties, it is even more likely that Congress would have provided for such procedural safeguards had it intended to limit review to the administrative record. In the absence of these procedural safeguards, it must be inferred that Congress intended the Court of Claims to continue its procedure of hearing evidence presented *de novo*.

The Appeals Board committed administrative irregularities which fully warranted the Court of Claims to render its decision on the basis of evidence presented *de novo*. The Board considered and relied on material documents not made known to respondent at the time of the hearing and not a part of the Board record. These documents contained damaging statements which respondent had no opportunity to refute before the Board. Respondent became apprised of these documents in the course of preparation for trial, and thus was able to refute before the Court of Claims the dam-